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No. 221] NEW DELHI, THURSDAY, AUGUST 27, 1953

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### ELECTION COMMISSION, INDIA NOTIFICATION

*New Delhi, the 14th August 1953*

**S.R.O. 1620.**—Whereas the election of Shrimati Prabhavati Gupta, as a Member of the Legislative Assembly of the State of Bihar, from the Kessaria constituency of that Assembly, has been called in question by an Election Petition duly presented under Part VI of the Representation of the People Act, 1951 (XLIII of 1951), by B Awadhesh Prasad Sinha, Village Bettiah Basant, P.O. Bhopatpur, P.S. Kessariya, Champaran;

And whereas, the Election Tribunal appointed by the Election Commission, in pursuance of the provisions of Section 86 of the said Act, for the trial of the said Election Petition has, in pursuance of the provisions contained in section 102 of the said Act, sent a copy of its Order to the Commission;

Now, therefore, in pursuance of the provisions of Section 106 of the said Act, the Election Commission hereby publishes the said Order of the Tribunal.

### ELECTION TRIBUNAL, PATNA

#### PRESENT:

Shri Basu Prasad, Retired District Judge, *Chairman*.

Shri Hargobind Prasad Sinha, Retired District Judge, *Member*.

Shri Aditya Narayan Lal, Advocate, *Member*.

#### ELECTION PETITION No. 124 OF 1952

In the matter of election to the Bihar State Legislative Assembly from Kessaria Constituency in the district of Champaran.

B. Awadhesh Prasad Sinha, village Bettiah Basant, P.O. Bhopatpur, P.S. Kessariya, Champaran—*Petitioner*.

#### *Versus*

1. Shrimati Prabhavati Gupta, wife of Rajendra Prasad, Village, P.O. and P.S. Kessariya, Champaran;
2. Shri Ram Lagan Prasad, Village Ojhawalia, P.O. and P. S. Kessariya, Champaran, at present pleader, Motihari;
3. Shri Baldeva Prasad Datta, village Bankat, P.O. and P. S. Kessariya, Champaran;
4. B. Devendra Narain Sinha, village Bhuwan Chapra, P.O. Bhuwanchapra, P.S. Kessariya, Champaran;
5. B. Ambika Kant Sinha, village Sitalpore, P.O. Sitalpore, P.S. Kessariya, Champaran;

6. Shri Mahadeva Prasad, village Bhopatpore, P.O. Bhopatpore, P.S. Kessariya, Champaran;
7. Shri Rameshwar Prasad Dutta, village Bankat, P.O. and P.S. Kessariya, Champaran;
8. Shri Jang Bahadur Singh, village Pokhara, P.O. Kotwa, P.S. Kessariya, Champaran;
9. B. Rameshwar Prasad Narain Singh, village, P.O. and P.S. Kessariya, Champaran;
10. B. Rajendra Prasad, village, P.O. and P.S. Kessariya, Champaran;
11. Shri Vidyasagar Prasad, Village, P.O. and P.S. Kessariya, Champaran;
12. Shri Jamuna Prasad Sah, village, P.O. and P.S. Kessariya, Champaran;
13. Shrimati Savitrilata Devi, wife of Shri Rajendra Pratap Narain Sinha, pleader Bhawanipore Zirat, Motihari, Champaran—*Respondents*.

*For the petitioner:*

1. Shri B. P. Sinha,
2. Shri K. P. Verma—*Advocates*.

*For the respondent No. 1:*

1. Shri P. N. Sinha,
2. Shri B. C. Ghosh,
3. Shri B. N. Singh—*Advocates*.

The petitioner, Shri Awdhesh Prasad Sinha, and respondents were candidates for election to the Bihar State Legislative Assembly from Kessariya Constituency in Champaran district. One Debi Singh had also filed his nomination paper, but his nomination paper was rejected at the time of scrutiny. Respondents 6 to 13 withdrew their candidatures after the scrutiny and only the petitioner and respondents 1 to 5 went to polls. On poll, respondent No. 1, Srimati Prabhavati Gupta, obtained the largest number of votes and was declared elected. Next to her, the petitioner obtained the largest number of votes.

The petitioner has challenged the validity of the election, that was held, on the following grounds:—

- (1) That on the date, 24th November 1951, when respondent No. 1 had filed her nomination paper, she was not an elector in any constituency of Bihar Legislative Assembly. She had filed her nomination paper incomplete and blank, but inspite of these things, her nomination was accepted by the Returning officer. The acceptance was improper and it has materially affected the result of the election.

It appears that respondent No. 1 had applied to the Election Commission on 20th November 1951, for entry of her name in the electoral roll of Darbhanga Municipality. But no order had been passed by the Election Commission till 24th November, 1951, which was the last date for the filing of nomination papers in respect of Kessariya Constituency. On 29th November, 1951, which was the date fixed for scrutiny of nomination papers, respondent No. 1 applied for time to produce the order of Election Commission enrolling her name as an elector in Darbhanga Municipality Constituency and the Returning Officer was pleased to adjourn the scrutiny to 1st December 1951. On 1st December 1951 respondent No. 1 produced the certified copy of extract from the electoral roll of Darbhanga Municipality showing entry of her name in the electoral roll on the basis of the order passed by the Election Commission. But the Election Commission, it is contended, had passed the order without notifying her application and without giving opportunity to the people to file objection, and so the order passed by the Election Commission in favour of respondent No. 1 is illegal and without jurisdiction.

- (2) That respondent No. 12, Shri Jamuna Prasad Sah, is father-in-law of respondent No. 1 and was Collecting Member Bench, and as such was in touch with the mukhias of Kessariya Thana. Shri Jamuna Prasad Sah, with the help of these mukhias, had exercised a good deal of pressure on the electorate of the Kessariya Constituency for voting in favour of her daughter-in-law and had held out threats to general public that if they did not vote for her, they would not get permits for sugar, cloth and kerosene oil. The mukhias and sarpanches mentioned in the schedule to the petition were appointed polling agents of respondent No. 1 and these persons had overawed the electors and had influenced them to vote for respondent No. 1.

(3) That the mukhtas and sarpanches being servants of Government, their employment as polling agents by respondent No. 1 was a major corrupt practice.

(4) That respondent No. 1 was of age less than 25 years on 24th November, 1951, on which date she had filed her nomination paper and so she was not entitled to stand for election.

(5) That the nomination of Debi Singh was improperly rejected by the Returning Officer and this rejection has also materially affected the result of the election.

On the above allegations, the petitioner, primarily, seeks a declaration that the election is wholly void, and in the alternative, seeks a declaration that the election of respondent No. 1 is void and that he has been duly elected.

Only two of the respondents, namely, respondent No. 1 (Shrimati Prabhavati Gupta) and respondent No. 2 (Shri Ram Lagan Prasad), have filed written statements.

Respondent No. 2 has filed a written statement supporting the petitioner's case. He, however, did not appear at the trial of the election petition.

Respondent No. 1 has filed a written statement contending that the election petition is not maintainable as it is not properly verified, and the details of the corrupt and illegal practices alleged to have been committed have not been given, as required by section 83 of the Representation of the People Act, 1951. She has denied the allegations of the petitioner and has claimed that on the date of filing of her nomination paper she was more than 25 years of age. According to her, the petitioner had withdrawn his objection to the acceptance of her nomination paper on production of the certified copy of the electoral roll. So, she has claimed that the petition is barred by the principles of estoppel acquiescence and waiver.

On the allegations of the parties, the following issues have been framed for trial.

#### ISSUES

1. Is the election petition as framed maintainable?
2. Is the petitioner estopped from challenging the qualification of the respondent No. 1 to stand for election?
3. Was the respondent No. 1 qualified to stand as a candidate from Kessariya Constituency for membership of the Bihar Legislative Assembly?
4. Was the nomination of the respondent No. 1 improperly accepted? If so, has the result of the election been materially affected by such acceptance?
5. Has any corrupt practice been committed by the respondent No. 1 or her agent or by any other person with the connivance of the respondent No. 1 or her agent? If so, is the election of the respondent No. 1 liable to be declared void?
6. Was the nomination of Devi Singh of village Kessariya improperly rejected? If so, has the result of the election been materially affected by such improper rejection?
7. Is the election wholly void?
8. Is the election of the respondent No. 1 void?
9. Is the petitioner entitled to a declaration that he has been duly elected as a member of the Bihar Legislative Assembly?
10. To what relief, if any, is the petitioner entitled?

#### FINDINGS.

*Issue No. 1*—The only defect in the election petition that has been pointed out is, that the verification, as originally done, was not proper, as the petitioner, in his verification, had not indicated which of the statements made in the petition were true to his knowledge and which of them true to the information received by him. The petitioner applied to the Tribunal on 22nd June 1953 for making correction in his verification and he was permitted to do so by order dated 23rd June 1953. The contention of respondent No. 1 is that in spite of this correction, the verification is still defective, as the petitioner has not disclosed the source of information in respect of the allegations which are based on information received by him and believed to be true. It has been also contended that there has been

no amendment in the verification as regards the alleged illegal and corrupt practices mentioned in the Schedule to the petition.

The verification of an election petition has to be done according to the provisions of the Code of Civil Procedure, 1908, as laid down in section 83 of the Representation of the People Act, 1951. Order 6, Rule 15, Code of Civil Procedure, deals with verification of pleadings and it does not lay down that the verification made should disclose the source of information. When no change in the verification has been made in respect of the schedule attached to the petition, it means that the statement made therein is based on the knowledge of the petitioner. Moreover, it is now well settled that a defect in verification is a more irregularity and the pleadings of a party cannot be thrown out on account of any such defect.

The other contention of respondent No. 1 is that, according to section 84 of the Representation of the People Act, 1951, the petitioner can claim only one of the reliefs enumerated therein. So, it has been contended that when the petitioner has claimed more than one relief, though in the alternative, the petition is not maintainable. We are unable to accept this contention as sound. We see no reason why the petitioner cannot mention in his petition more than one relief to which he considers himself entitled on the basis of the allegations made by him. It is for the tribunal to decide to which specific relief the petitioner is entitled on the case established by him. It is evident that when a petitioner claims the election to be wholly void, he cannot also claim that he be declared to be elected instead of the returned candidate. But simply because he has claimed both the reliefs, in the alternative, the petition cannot be thrown out as not maintainable. Moreover, at the time of the argument, the petitioner indicated that he was not pressing his claim that he be declared elected instead of respondent No. 1. So, now there is only one relief which the petitioner is seeking and we decide this issue in the favour of the petitioner.

*Issues Nos 3 and 4.*—The Government Notification, Ext. 3, serial No. 97, shows that in respect of Kessariya Constituency the last date for filing of nomination papers was 24th November, 1951. The nomination paper (Ext. 1) of respondent No. 1 shows that it was filed by her on 24th November 1951. Column 7 of it is for mentioning the name of the constituency, in the electoral roll of which the name of the candidate is included, and it reads as follows:—"Darbhanga, Ward No 4 of Darbhanga Municipality, House No. 2, mohalla Mirzapur." Column 8 is for the serial No. of the candidate in the electoral roll and it is blank. At the time of filing of her nomination paper respondent No. 1 also admits to have filed the petition (Ext. 5) before the Returning Officer in which she had stated that she had applied to the Election Commission for inclusion of her name in the electoral roll and that the final orders had not yet been received and she had made a request to accept her nomination paper, defective as it was.

The date of scrutiny was, originally, fixed as 29th November 1951. On or before this date, respondent No. 1 received from the Chief Electoral Officer, Bihar, a post copy of the telegraph (Ext. 6) in which the Election Commission had directed the inclusion of her name in the electoral roll of Darbhanga. Ext. 17 is the telegram which was directly sent by the Chief Electoral Officer, Bihar, to the S.D.O. Darbhanga, informing him of the decision of the Election Commission regarding inclusion of the name of respondent No. 1 in the electoral roll concerned. This order of the Election Commission regarding inclusion of her name in the electoral roll of Darbhanga Constituency was passed on the basis of her petition (Ext. 4) dated 20th November 1951.

When the scrutiny of the nomination papers was taken up by the Returning Officer, objection was raised by the petitioner to the acceptance of the nomination of respondent No. 1. The ordersheet (Ext. 8) shows that respondent No. 1 was contending before the Returning Officer that the order in her favour had been passed by the Election Commission on or before the 24th November, 1951, which was the last date for filing of the nomination paper and on which date she had actually filed her nomination paper. The petition (Ext. 7), dated 29th November 1951 also shows that respondent No. 1 had made a request to the Returning Officer for 3 days time to produce the order of the Election Commission regarding inclusion of her name in the electoral roll which was passed on or before 24th November 1951. The scrutiny was adjourned to 1st December 1951. But respondent No. 1 did not produce any document of Election Commission showing the date on which the order had been passed in her favour. She simply produced certified copy of the electoral roll (Ext. B) showing that her name had been entered in the electoral roll of Darbhanga Constituency. On production of Ext. B, it is said, the petitioner had waived his objection regarding the acceptance of her nomination paper and it was accepted by the Returning Officer.

The question for consideration is, what is the effect of the order of the Election Commission regarding entry of respondent No. 1's name in the electoral roll of Darbhanga Constituency. The order of the Election Commission was passed under Sub-rule 2 of Rule 20 of the Representation of the People (Preparation of Electoral Rolls) Rules, 1950, which were framed under the provisions of sections 25 and 28 of the Representation of the People Act, 1950. Sub-rule 3 of rule 20 runs as follows:—"When any list is republished under sub-rule (1), or a direction is issued under Sub-rule (2), the electoral roll to which such list or direction relates shall be deemed to have been revised accordingly."

The contention of respondent No. 1 is that the use of the word 'deemed' indicates that the direction given by the Election Commission has got a retrospective effect and her name should be considered to have been entered in the electoral roll on the date it was finally published, which would be long before the date on which she filed her nomination paper. The word 'deemed' has been used in the Representation of the People Act, 1950, as well as in the Representation of the People Act, 1951, in many places. Its use in those places does not indicate that it has been used for giving a retrospective effect. For instance, it has been used in sub-section (3) of section 36 of the Representation of the People Act, 1951, and it can have no retrospective effect. Similarly, it has been used in section 22A, of the Representation of the People Act, 1950, and there also it has got no retrospective effect. So, the mere use of the word 'deemed' cannot be interpreted to mean that the direction given by the Election Commission was intended to have a retrospective effect, unless there is something more in sub-rule (3) of Rule 20 to give a clear indication to this effect. It appears that the use of the word 'deemed' has been made to put greater emphasis than would have possible, if some other word, such as, 'considered', had been used. To us, it also appears that, according to the provisions of sections 23 and 24 of the Representation of the People Act, 1950, the electoral roll once prepared can be revised only when a fresh electoral roll is going to be prepared and the electoral roll in question, which was prepared for the first time, was to remain in force till 30th of September, 1952. But by section 25, clause (a) of the Representation of the People Act, 1950 the Election Commission has been empowered to make correction in the Electoral Roll that has been published. The preparation of an electoral roll is a complicated affair and has to be done in several stages by taking different steps.

The use of the word 'deemed' in sub-rule 3 of Rule 20 only shows that all these steps will not have to be taken and the electoral roll will be considered to have been revised in accordance with the direction of the Election Commission from the date of issue of such direction. By giving effect to such an order retrospectively, many complications and difficulties would arise and so such an interpretation cannot be accepted in absence of a clear indication that the direction given by the Election Commission has got retrospective effect. Supposing a person, whose name is not entered in the electoral roll, files his nomination paper on the last date and also applies to the Election Commission for entry of his name in the electoral roll, it is obvious that by the time the scrutiny is held, the Election Commission in spite of its best efforts may not be able to pass an order in favour of such a candidate. The result will be that his nomination paper will be rejected. But if the Election Commission ultimately passes an order in his favour and he is to be considered an elector from the date of the final publication of the electoral roll, i.e., to say, from long before the filing of his nomination paper, he may very well contend before an Election Tribunal that his nomination paper had been improperly rejected and the election held is void. So, in our view, the direction given by the Election Commission has got no retrospective effect and has got its effect from the date of its issue.

The order of the Election Commission in favour of respondent No. 1. (Ext. 15) bears no date and does not show from what date it was to come into effect. But the letter (Ext. 16) shows that the direction in question was issued by the Election Commission to the Electoral Registration Officer of Darbhanga Constituency on 27th November 1951. So, we may very well take that the direction in question was issued on 27th November 1951, and not before that date. From Sub-rule 3 of Rule 20, it appears that the direction of the Election Commission is to take effect from the date of its issue, and not from the date the direction is made. The date of issue of the direction is 27th November 1951. So, even if the order (Ext. 15) was made before that date, it has got no material value. We are also of opinion that if respondent No. 1 really intended to contend that the order (Ext. 15) was passed in her favour on or before 24th November, 1951, and it had its effect from the date of the order, it was for her to prove on what date this order was actually made. On the other hand, the petitioner produced a certificate (Ext. 23) showing that the order in question was actually made on 27th November, 1951. We have,

however, not taken into consideration this document in arriving at the conclusion to which we have come, as in our opinion, this certificate is not a public document and is not admissible in evidence without examination of the person signing it.

When respondent No. 1 has failed to establish that the order passed in her favour by the Election Commission was issued on or before 24th of November, 1951, the date on which she filed her nomination paper, we have to consider if she was competent to file the nomination paper and if it has been properly accepted by the Returning Officer.

Under section 32 of the Representation of the People Act, 1951, the nomination paper of a candidate to fill a seat in any constituency can be filed only when he is qualified to be chosen to fill that seat under the provisions of the Act and the Constitution of India. Section 5 of the Act lays down the qualification for membership of the Legislative Assembly and Clause "C" of it says that in order to be a member of the Legislative Assembly of a State, the person must be an elector for any Assembly constituency in that State. Section 2, Clause (e), of the Act defines "Elector" and it says that in order to be an elector the name of the person must be entered in the electoral roll of a constituency. Article 173, clause (b), of the Constitution lays down that in order to be a member of a Legislative Assembly a person must not be less than 25 years of age. So, before respondent No. 1 was eligible to file her nomination paper it was necessary for her to establish (i) that her name was entered in any of the constituencies of the Bihar State Legislative Assembly and (ii) that she was not less than 25 years of age. It is clear that on 24th November 1951, the date on which she filed her nomination paper, her name was not entered in any of the constituencies of the Bihar State Legislative Assembly. She had only made an application to the Election Commission on 20th November 1951 for entry of her name in the electoral roll of Darbhanga Municipal Constituency, but no order had till then been passed. The direction in her favour was issued by the Election Commission so late as 27th November, 1951. So, it is evident that on the date she filed her nomination paper she was not an elector and was not competent to file her nomination paper.

It has been urged before us that the qualification of respondent No. 1 to be chosen as a candidate for election to the Bihar State Legislative Assembly is to be considered with respect to her status on the date of the scrutiny, and not on the date she had filed her nomination paper. This argument has been advanced on the basis of sub-sections 2(a) and 7(a) of Section 36 of the Representation of the People Act, 1951, which deal with the scrutiny of nomination paper. Sub-section 2(a) provides that the Returning Officer may refuse any nomination on the ground that the candidate is not qualified to be chosen to fill the seat under the Constitution or the Act. Reading this sub-section along with section 32, it seems to us clear that the material date is the date when the person is nominated as a candidate for election by presentation of the nomination paper to the Returning Officer, and not the date of scrutiny of the nomination paper. The candidate, therefore, must be qualified on the date of such nomination. The argument of the respondent is that when, at the time of scrutiny on 1st December 1951, she produced a certified copy of her electoral roll, it established her right to stand for election and to file the nomination paper which she had filed on 24th November 1951. The certified copy of the entry in an electoral roll is, no doubt, conclusive evidence under section 36, sub-section 7(a), of the right of an elector named in that entry to stand for election. But this right comes into operation when he is nominated by presentation of the nomination paper, and not when the scrutiny is held. The holding of scrutiny is only an intermediate step between the filing of the nomination paper and the holding of the election. This is done only with a view to check whether a person, who claims to stand for election, is competent to do so or not. The scrutiny could have been done just when the nomination paper is filed. But a definite subsequent date is fixed only to complete the filing of all the nomination papers and to give facility to the candidates to raise objection, if any, to the nomination of their rivals. So, in our view, the date of the scrutiny has got nothing to do with the date with regard to which the qualification of a candidate is to be considered in respect of his claim to stand for election. We, therefore, hold that respondent No. 1 was not qualified to be chosen as a member of the Bihar Legislative Assembly for the reason that her name was not entered as an elector in any of the constituencies of the said Assembly on the date on which she presented her nomination paper.

The nomination paper filed by respondent No. 1 suffers from the defect that col. 8 of it is blank and col. 7 gives a wrong description of the constituency in which she had stated that her name was being entered as an elector. The entry

against col. 7 gives the description of her residence at Darbhanga, and not of the constituency in which her name could have been possibly entered. The constituency is "Darbhanga", and not "Darbhanga, Ward No. 4 of Darbhanga Municipality, House No. 2, mohalla Mirzapur." The Returning Officer, Sheoraj Nandan Sharma (R.W. 6), admits to have noted the discrepancy and the omission in the nomination paper of respondent No. 1. Under section 33, Clause (6) of the Representation of the People Act, 1951, the Returning Officer is required to have before him a certified copy of the Electoral Roll of the candidate, if his name is not entered in the Electoral Roll of the constituency of which he is the Returning Officer. But he overlooked the defects noted by him, as he says that he had received instructions from the Election Commission to receive such defective nomination papers, if an application had been made to it for the entry of the name of the candidate as an elector in any constituency of that State. No such instruction or Circular of the Election Commission has been produced before us. When the Returning Officer could not have rejected the nomination paper of respondent No. 1 before the holding of the scrutiny, it matters very little, if he overlooked the defects in the nomination paper of respondent No. 1 on account of some instructions received from above or of his own inclination. When respondent No. 1 was not competent to file the nomination paper, it is not necessary to consider whether the defects pointed out above are material or not.

Two other points which remain to be decided are (i) whether the name of respondent No. 1 was rightly entered in the electoral roll of Darbhanga Constituency under orders of the Election Commission, and (2) whether respondent No. 1 was of 25 years of age at the time she filed her nomination paper. Suggestion has been made that, from the time of her marriage, respondent No. 1 was residing at the house of her father-in-law at Kessariya, and was not residing at Darbhanga. It has also been urged that the Election Commission was not competent to give the direction regarding inclusion of her name in the Electoral roll of Darbhanga Constituency without giving proper notice in order to enable any one to raise an objection as regards her claim to have her name entered in that electoral roll. The evidence on the record shows that respondent No. 1's husband has got a residential house at Darbhanga and he generally resides there in connection with his business. The evidence of respondent No. 1 is that she generally resides with her husband at Darbhanga. This is natural and we have no reason to disbelieve it. So, she was qualified to have her name entered in Darbhanga Constituency. The Election Commission had issued the direction regarding inclusion of her name in this constituency under sub-rule 2 of Rule 20 of the Representation of the People (Preparation of the Electoral Rolls) Rules, 1950. This Sub-rule shows that the Election Commission, in order to be satisfied regarding the claim of an applicant to get his name entered in an electoral roll, can give such notice and hold such enquiry as it thinks fit. So, when the Election Commission issued the direction in favour of respondent No. 1 for inclusion of her name in the electoral roll of Darbhanga Constituency, it must be presumed that the act was done properly and the matter rests there and cannot be agitated before us.

It has been urged before us that respondent No. 1 was not of 25 years of age when she filed her nomination paper. The certified copy of the extract from the electoral roll (Ext. B) gives her age as 26 years. So, it is for the petitioner to establish beyond doubt that respondent No. 1 was below 25 years when she filed her nomination paper. In order to establish this claim, the petitioner has examined himself and one Mukh Lal Misser (P.W. 3) who claims to be the priest of the family of the husband of the respondent No. 1. It is evident that if P.W. 3 had been really priest of her husband's family, he could not have come forward to give evidence against her interest. His evidence leaves no doubt that he has been lying in giving evidence and has been induced for some reason or other to give evidence for the petitioner. He claims to have seen the horoscope of respondent No. 1 and to have prepared a copy of it (Ext. 20). He also claims to have made a note of her birth date, namely 1st April 1928, as given by her. His evidence shows that he does not know anything about the matter and there appears to be absolutely no reason why he should have been called for any consultation. He claims to have made a note of the English birth date of respondent No. 1 for giving it to his "mama" (maternal uncle) who is said to be great astrologer. But if respondent No. 1 or any member of her husband's family was in need of an astrologer the "mama" would have been called and not this P.W. 3. So, we place no reliance on his evidence.

The petitioner (P.W. 4) claims to have seen the original petition which respondent No. 1 had submitted for permission to appear at the High School Examination and which gives her birth date as 1st April 1928. But he has been

contradicted by his own witness, P.W. 5 (H. N. Chaturvedi) who has said that such applications are destroyed at the end of 3 years. Respondent No. 1 appeared at the High School Examination in 1943 and so it is not expected that her application would be available for inspection so late as 13 months ago, as claimed by the petitioner. The evidence of the petitioner shows that a copy of such a petition is issued only to the candidate on swearing an affidavit. So, there is absolutely no reason why he should have been allowed to inspect it, even if it was in existence, 13 months ago. But the petitioner has produced U. P. Gazette (Ext. 21) showing the names of candidates who had passed High School Examination in 1943 and it gives the name of respondent No. 1 and the date of her birth as 1st April 1928. He has also produced Tabulation Register (Ext. 22) which also gives her birth date as 1st April 1928. There is no dispute that a High School Examination certificate giving the date of birth of the person passing the examination is issued. Respondent No. 1 did get this certificate and she was asked to produce it. But she has not produced it on the ground that it is missing. If her certificate contained date of birth other than 1st April 1928, she could have easily produced a duplicate copy of it. So, we have no doubt that her age is given in the High School Examination certificate is 1st April 1928.

\* Respondent No. 1 has also produced evidence in proof of her age. One of them is certificate, Ext. C, which she obtained on passing Parthma Examination in Sanskrit. According to this certificate, she was of 14 years 11 months on 15th October, 1940. There is also evidence that when a child is born in her father's family, Pandit Dinbandhu Misra, who is the family priest, makes a note of the date of the birth of the child on the Patra of the year. Dinbandhu Misra has been examined on commission. He has also produced the Patra in question (Ext. I) and the note (Ext. H) made thereon regarding the date of birth of respondent No. 1. According to the entry made thereon, respondent No. 1 was born on Phagun Bhadi 4, Sambat 1982, which corresponds to 2nd February 1926. There is discrepancy of some months in respect of her age as given in the certificate. Ext. C, and as entered in the note, Ext. H, on the Patra. But we have not to determine the exact date of birth of respondent No. 1 and have only to see if she was above or below 25 years of age when she filed her nomination paper on 24th November 1951. That she was more than 25 years at that time is proved by both the documents, Ex. C and Ex. H. Respondent No. 1 has also examined herself and her father, Gajadher Prasad (R.W. 4). According to both of them, she was more than 25 years of age at the time she had filed her nomination paper. We have no reason to disbelieve this evidence. So, the only evidence in support of the petitioner regarding the age of respondent No. 1 are the entries in the papers relating to her passing the High School Examination. It may be that a lower age was mentioned with some ulterior motive in connection with her passing the High School Examination. So the evidence produced by the petitioner is not sufficient to enable us to discard the evidence that has been produced before us by the respondent No. 1 to show that she was more than 25 years of age at the time she filed her nomination paper. So, we are unable to accept the contention of the petitioner that respondent No. 1 was not of 25 years of age on the date when she filed her nomination paper.

In view of our finding that respondent No. 1 was not qualified to be chosen as a member of the Bihar Legislative Assembly for the reason that her name was not entered as an elector on the date on which she presented her nomination paper. We hold that her nomination was improperly accepted by the Returning Officer. Respondent No. 1 being the returned candidate, we hold further that the result of the election has been materially affected by such improper acceptance. These issues are, therefore, decided in favour of the petitioner.

*Issue No. 2.*—The contention of respondent No. 1 is that, when, at the time of the scrutiny, the petitioner withdrew his objection as regards acceptance of her nomination paper, he is now not competent to raise this objection on principles of estoppel, acquiescence and waiver. The petitioner, in his evidence, has denied that he had withdrawn his objection. The respondent No. 1 as well as the Returning Officer, (R.W. 6) have, no doubt, stated in their evidence that on production of the certified copy of the electoral roll by respondent No. 1, the petitioner had withdrawn his objection. The statement of the Returning Officer is corroborated by the order sheet (Ext. 8). We are inclined to accept the evidence of the respondent on this point. But the question remains whether the petitioner is estopped from raising the objection in this proceeding. Whether respondent No. 1 was competent to file her nomination paper or not was a question of law. There can be estoppel, waiver, or acquiescence on a question of fact, but not on a question of law. So, we are unable to accept the contention of respondent No. 1 that the



petitioner is debarred from challenging her qualification to stand for election on the principles of estoppel, waiver, and acquiescence.

**Issue No. 5.**—There is no evidence in support of the allegation that undue influence or coercion was exercised by any one on behalf of respondent No. 1 to compel the voters to vote for her. No doubt, it has been alleged that a number of mukhias and sarpanchs had acted as polling agents for her. But the only evidence, that is worth consideration, is in respect of Rameshwar Pratap Narayan Singh who was mukhia of village Messariya at the time of the election. The petitioner has produced the letter of appointment (Ext. 19) showing that respondent No. 1 had appointed Rameshwar Pratap Narayan Singh as her polling agent at Kessariya M. E. School Polling Station and the latter had accepted to work as her polling agent. The respondent, in her evidence, has tried to get rid of this document by saying that she had signed blank forms and so could not be responsible for appointment of Rameshwar Pratap Narain Singh as her polling agent. According to her suggestion, his name was, at best, put in Ext. 19 by her husband. But she is not in a position to deny that Rameshwar Pratap Narain Singh had worked as her polling agent at Kessariya M. E. School polling station. Rameshwar Pratap Narain Singh has also not come forward to deny this allegation. On the other hand, the petitioner (P.W. 4) and Sureshwar Pratap Narain Singh (P.W. 2), who is cousin of Ram Pratap Narain Singh, have stated that Rameshwar Pratap Narain Singh had worked as polling agent of respondent No. 1 at Kessariya M. E. School Polling Station. Mahender Prasad (R.W. 3) has, no doubt, stated that Rameshwar Pratap Narain Singh had not worked as polling agent of respondent No. 1 at Kessariya M. E. School booth. But he has gone to the extent of even denying that Rameshwar Pratap Narain Singh was appointed polling agent of respondent No. 1. So, we are unable to attach any importance to his evidence and we have no doubt that Rameshwar Pratap Narain Singh had worked as polling agent of respondent No. 1 at Kessariya M. E. School polling station.

Now, the question for consideration is, what is the effect of this action of Rameshwar Pratap. Narain Singh. Under section 100, clause 2(b), of the Representation of the People Act, 1951, when any corrupt practice specified under section 123, is found to have been committed, the election of the returned candidate is void. Section 123, clause (8) shows that obtaining any assistance from a person serving under Government of any State is a major corrupt practice. The explanation under sub-clause (b) attached to clause (8) makes a village headman or any other village officer by whatever name he is called, a person serving under the Government of a State. It has been contended that 'mukhia' is a village headman and a person serving under the Government. We are not prepared to accept this contention as correct. The real test of a person serving under the Government is that his salary is paid by the Government. A 'mukhia' draws no pay and is not a Government servant. Under section 79 of the Bihar Panchayat Raj Act, 1947, a Government servant has been specifically debarred from holding the post of 'mukhia' or 'sarpanch'. When a 'mukhia' can be a member of Legislative Assembly, there is absolutely no reason why he should not be able to work as polling agent of a candidate, if he so likes. So, this issue is decided in favour of respondent No. 1.

**Issue No. 6.**—The nomination paper of Debi Singh, Ext. 1(B), shows that it was rejected as the Chalan or receipt showing the deposit of security money was not attached to it. Debi Singh (P.W. 1), in his evidence, has stated that he had filed the chalan along with his nomination paper, but he had not attached or gummed it to his nomination paper as he was in hurry. The nomination paper, ext. 1(b), shows that it was filed before the Returning Officer at 2-30 p.m. on 24th November 1951. The evidence of Debi Singh shows that he had filed it even earlier, namely, at 2 or 2-15 p.m. At least, he had half an hour for filing of his nomination paper which had to be filed by 3 p.m. on 24th November 1951. The stitching of the chalan or gumming it to his nomination paper would not have taken more than a few minutes, if the chalan was really available to him to be filed along with his nomination paper. So, it appears that he had come to court rather late and though he had made the deposit of security money on 24th November 1951, as shown by his portion of the chalan, Ext. 18, it was not available to him up to 3 p.m. to be filed along with his nomination paper. The evidence of the Returning Officer shows that he, personally, used to receive the nomination papers and he also used to keep them in his sole custody. So, there is absolutely no reason how the chalan could have disappeared, if it had been really filed along with the nomination paper. No doubt Debi Singh has stated in his evidence that the chalan was searched for and was found in the office, but by that time, his nomination paper had been rejected. We are not prepared to attach any importance to this claim specially in view of the fact that the chalan, which is

said to have been found in the office, has not been called for by the petitioner. It is also quite possible that Debi Singh might not have been, at the time of scrutiny, in possession of his portion of the chalan, Ext. 18, and so he was not in a position to satisfy the Returning Officer that he had deposited the security money. The evidence of the Returning Officer shows that before rejecting a nomination paper, he used to give out the defect noted by him. We have no doubt that, at the time of the scrutiny, Debi Singh was not in a position to satisfy the Returning Officer that he had deposited the necessary security money. So, his nomination paper was rightly rejected and we find accordingly.

In view of this finding, the second part of this issue does not arise.

*Issue No. 9.*—This claim has not been pressed before us.

*Issue Nos. 7, 8 and 10.*—In view of our decision on issues Nos. 3 and 4, we hold that the election is wholly void, and, consequently the election of respondent No. 1 is also void.

The result, therefore, is that the election petition succeeds.

#### ORDER

The election petition is allowed. The election in the constituency in question is declared to be wholly void and, consequently, the election of respondent No. 1 to the Bihar Legislative Assembly from Kessariya Constituency in the district of Champaran is set aside. We direct respondent No. 1 to pay Rs. 100 (One Hundred) as cost to the petitioner.

(Sd.) BASU PRASAD, *Chairman.*

(Sd.) HARGOBIND PRASAD SINHA, *Member.*

(Sd.) ADITYA NARAYAN LAL, *Member.*

HIGH COURT, PATNA;

*The 5th August, 1953.*

Typed at my dictation and revised and corrected by me.

(Sd.) H. P. SINHA, *Member.*

[No. 19/124/52-Elec.III/719.]

By Order,

P. R. KRISHNAMURTHY, *Asstt. Secy.*